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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF THE PETITIONER

Opinion Below

The Opinion of the Court of Appeals of the State of New Mexico is reported in 83 N.M. 158, 489 P. 2d [illegible] (Ct. App. 1971) (App. 62).

Jurisdiction

The Mescalero Apache Tribe is engaged in a business enterprise, a ski resort, which by necessity is located primarily on United States lands adjacent to the Mescalero Apache Reservation. The State of New Mexico sought to tax: (1) The use of tangible personal property owned by the Tribe and used in this business which is wholly owned and operated by the Mes-

calero Apache Tribe; (2) the gross receipts of the Tribal enterprise, a privilege tax, on the privilege of doing business in New Mexico. The compensating tax was imposed pursuant to Section 72-17-3, N.M.S.A., 1953 Comp., and the gross receipts tax was assessed under the Emergency School Tax Act as amended, being Sections 72-16-1 through 72-16-47, N.M.S.A., 1953 Comp.

A timely Claim for Refund and Protest of Assessment was filed with the Commissioner of the Bureau of Revenue of the State of New Mexico in Santa Fe, New Mexico by the Mescalero Apache Tribe. The Protest and Claim for Refund were denied by the Commissioner of the Bureau of Revenue on the 23rd day of December, 1970, holding that the Tribal interests were taxable. The matter was appealed to the Court of Appeals of the State of New Mexico pursuant to Sections 16-7-8 (F) and 72-13-39 N.M.S.A., 1953 Comp. On August 6, 1971, the Court of Appeals of the State of New Mexico affirmed the decision of the Commissioner of the Bureau of Revenue, by a Court divided on rationale. A timely Motion for Re-hearing was filed and an Order denying the Motion for Re-hearing was entered September 7, 1971. A timely Petition for Writ of Certiorari was filed with the Supreme Court of the State of New Mexico on September 23, 1971 and an Order Denying the Petition for Writ of Certiorari was entered on October 6, 1971. This was the final order entered in this cause by the New Mexico appellate courts. The jurisdiction of this Court rests in 28 U.S.C. 1257(3).

Questions Presented

1. Can the State of New Mexico, acting under state law, validly impose a tax upon the use of tangible personal property owned by an Indian tribe and utilized in a Tribal operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enterprise pursuant to federal statutes for Indian economic development?

2. Can the State of New Mexico, acting under state law, validly impose its gross receipts tax, a privilege tax, upon an Indian tribe operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enterprise pursuant to federal statutes for Indian economic development?

Constitutional Provisions, Statutes and Regulations Involved

The relevant Constitutional provisions, statutes, cases and regulations are as follows:

The U.S. Const. Art. I, Sec. 8, Cl. 3:

"The Congress shall have power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The Treaty of July 1, 1852, 19 Stat. 979, between the United States of America and the Mescalero Apache Tribe. The Treaty is contained in the Appendix (App. 9).

3. 25 U.S.C. 465:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allotee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 466, 470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust

for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

25 U.S.C. 470:

"There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established."

The Enabling Act For New Mexico, Ch. 310, § 2, 36 Stat. 557 (1910):

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been ex-

tinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall be exempt from taxation by said state so long and to such extent as congress has prescribe or may hereafter prescribe.

6. The other statutes and regulations are too long for reproduction in this portion of the brief and are attached as Appendix A of this brief.

Statement

The Petitioner in this case is the Mescalero Apache Tribe, an Indian Tribe organized under the Indian Reorganization Act. The Petitioner entered into a treaty with the United States of America in 1852. The Mes-

Indian Reservation, where the Mescalero Apache Tribe resides, is comprised of a small part of the Tribe's aboriginal homelands. Pursuant to 25 U.S.C. 476, the Mescalero Apache Tribe in 1936 adopted a Constitution, revised January 12, 1965 (App. 13), and has continued to be a viable, functioning Indian tribe performing governmental functions under that Constitution, tribal ordinances and applicable federal statutes.

Over the years the Mescalero Apaches have attempted to develop the reservation and lands near the reservation for the economic betterment of all members of the tribe. In furtherance of the tribe's goals for economic independence and to improve the general well-being of the tribe, the tribe developed a ski resort located in Otero and Lincoln Counties, New Mexico. The name of this resort is Sierra Blanca Ski Enterprises and it is exclusively owned and operated by the Mescalero Apache Tribe. The ski resort is on lands belonging to the United States Forest Service, which lands have been leased to the tribe for a period of thirty years. The ski resort area is bordered on the south by the Mescalero Reservation with some of the cross-country ski trails actually located on the reservation, however, the majority of the ski facility is located on the federally leased lands.

The lease with the United States Forest Service was executed by the Tribe pursuant to Article XI, Section 1 of the Tribe's Constitution (App. 19-20). Even though these leased lands are located outside the physical boundaries of the reservation, the facilities at the ski area are under federal control through the De-

partment of the Interior the same as any facility located within the actual boundaries of the reservation. The basic purpose of the ski resort is to provide revenue for the tribe in lieu of raising revenue through the taxation of tribal members or in some other endeavor. The revenue from the ski resort is being used for the educational, social and economic welfare of the Mescalero Apache Tribe. The ski area also provides a job training center for the Mescalero Apache people and approximately twenty to thirty tribal members are employed at the ski resort in a job training capacity (App. 3-4).

After a feasibility study by the federal government, the Tribe secured financing from the federal government under 25 U.S.C. 470.

In May of 1968, after improvements had been made and the ski resort was in operation, the Bureau of Revenue of the State of New Mexico conducted an audit. All of the materials against which the tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C. 470, and the purchase of all such materials were subject to and approved by the Bureau of Indian Affairs, all as outlined in 25 C.F.R. pt. 91. Not only were the materials purchased with money borrowed by the Tribe from the federal government, but also the plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government (App. 3-6).

As a result of such assessment, a written protest was timely filed by the Tribe as required by Section

of the Tax Administration Act for the State of New Mexico. The procedures as outlined in the [illegible] above were then followed. The facts were stipulated by both parties at the time of the hearing before the Commissioner of Revenue, and the same stipulated facts have governed this case at each step of the appellate process (App. (2-3).

This economic enterprise was a further step by the progressive tribe to become self-reliant and to fulfill federal Indian policy of nurturing Indian resources so that they lead to economic independence and self-development. This purpose was admitted by the state in this very enterprise (App. 3-4). The tax by the Bureau of the State of New Mexico not only challenges this self-reliance, but flaunts the very existence of the Petitioner as a body politic - a sovereign Indian tribe under the control of the federal government. By imposing the taxes in this case, the state is saying it can assert control over the Petitioner. For years the Petitioner struggled to grow with the assistance of the federal government. The federal government has responded with legislation, regulations and Bureau of Indian Affairs control to see that this economic development was not impaired. It should be noted that New Mexico is not a "Public Law 280" state. The state has not attempted to undertake the duties and responsibilities for these Indians, but it expects to extend its taxing power over their economic efforts.

[illegible] property was not subject to state taxation [illegible] the house and plow were utilized for economic

development. The means have changed, such as the ski enterprise in this case, but the purpose is unchanged. The ski resort is furthering the national policy of aiding the Indians' economic development. It is natural for the Indian tribe to turn to the federal government in development of these enterprises. Under such control and concern, the tribe has turned to the federal government when seeking means of implementing plans for economic development; funds available under 25 U.S.C. 470 appeared as a natural avenue for the development of the ski area. It is through the funds available under 470 that the resort area was constructed and another leg to economic stability was added to the life of the Tribe.

In years gone by, roaming the land and using the resources of nature have been the way of life for the Mescalero Apache people; now, they are attempting to utilize these resources for tribal development in a way acceptable to the white man's civilization. As the Mescaleros have turned from roaming the land to developing the land, they have always turned to the federal government for guidelines and assistance. It would be unfair to this tribe to see a trust relationship established over one hundred years ago and nurtured by the protection of the federal government destroyed by the tax efforts of the state of New Mexico.

Summary of Argument

The State of New Mexico has attempted to tax a sovereign Indian tribe in the operation of a ski resort adjacent to the Tribe's reservation; this resort was developed through federal funding, and like other tribal

activities, is under the control and direction of the Bureau of Indian Affairs of the Department of Interior. The State of New Mexico is without authority to tax either the gross receipts or the use of tangible personal property of the ski resort for the following reasons:

A. The federal government has complete control over the Petitioner through the powers established in the Commerce Clause, U.S. Const. Art. I, Sec. 8, cl. 3 and the Treaty of 1852. This power has been implemented by federal legislation that indicates continued concern and control for Indian tribes by the national government. It is such legislation, and specifically that legislation dealing with economic development, that assisted the tribe in developing the ski resort. 25 U.S.C. 470. Such active participation by the federal government has precluded the state from any control. 25 U.S.C. 465 specifically removes any question of state action in the tax area by stating that interests acquired under 25 U.S.C. 470 shall be taken by the [illegible] in trust for the tribe and shall be exempt from state taxation.

The State of New Mexico relinquished any authority over Indian held interests when it entered the union. The New Mexico Enabling Act has been interpreted by this Court in *United States v. Sandoval*, 231 U.S. 28 (1913), which acknowledges broad federal control over Indian tribes; it further states that for New Mexico to gain control over Indian tribes, it must do so by specific authorization from Congress.

The pattern of continued responsibility has been developed over the years by the federal government and

has left no room for tax action by the State of New Mexico.

B. The action of the state interferes with the Tribe's right to self-government. The Tribe is seeking stability through economic development of its land resources on and near the reservation. Such development means continuity of tribal integrity and customs while assuring the tribal sovereignty.

Federal protection of tribal sovereignty was developed in *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515, 8 L.Ed. 483 (1832), and has been carried down to the present time. Such a doctrine of tribal sovereignty has given the tribes independence from state government and is consistent with the guardian-ward relationship which developed between the tribes and the federal government as a result of the federal government's assumption of responsibility for the Indians. Due to this guardian-ward relationship, the tribe relied substantially on the federal government for assistance and has made few claims upon the state. It seems incongruous that a state would have taxing power over an Indian tribe when its other contacts with such tribe are minimal.

The Mescalero Apache Tribe has developed as an independent, viable community in which the laws of the State have no force and effect. *Williams v. Lee*, 358 U. S. 217, 219, 3 L.Ed.2d 251 (1959). *Williams* not only holds that the state law may not be applied where it interferes with a tribe's right to self-government, but also lays down a very narrow area in which tribal relationships were considered not to be jeopar-

...ated by action. See 358 U. S. at 220-221, 3 L.Ed.2d at ...-224. The present case does not fall within any of ... narrow exceptions. In fact, no greater threat to ... government can be imagined than the allowance ... one sovereign to tax another. The power to tax is ... power to destroy rationale of *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 427, 4 L.Ed. 579 (1819), ... been applied to Indian tribes in *United States v. Rickert*, 188 U. S. 432, (1903).

The Tribe's sovereignty, under federal control and ..., precludes the state from imposing taxes ... interfere with that sovereignty.

C. The Tribe is a federal instrumentality. *Federal ... Law* at pp. 472-473, states that an Indian tribe ... an instrumentality of the federal government; this ... been stated by this Court in *United States v. Rickert*, 188 U.S. 432, 437-438 (1903).

... the guardian-ward relationship between the ... government and the tribe some agency or bu... of the government must be utilized in working ... the Indians, this has normally been the Bureau ... Indian Affairs. The state would not be able to tax ... Bureau of Indian Affairs in assisting the economic ... growth of the tribe, and it must logically follow that ... the instrument becomes the tribe itself, the in... ...ulation from state taxation remains.

... conclusion, all of the foregoing arguments of ... Petitioner indicate a federal policy fostering eco... ... development of the American Indian. Such a ... implemented by specific federal legislation and

holdings of this Court, removes any tax authority of the State of New Mexico to tax this sovereign Indian Tribe. Such a tax would lead to the eventual destruction of the tribal entity, thereby destroying efforts to improve the way of life of these first Americans.

Argument

I

THE STATE OF NEW MEXICO HAS NO AUTHORITY TO TAX THE MESCALERO APACHE TRIBE BECAUSE THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION OVER THE TRIBE.

The Tribe contends that the State of New Mexico has no authority to tax because exclusive jurisdiction over the Tribe is vested in the federal government and such taxation is inconsistent with the Treaty of 1852 and specific federal legislation.

The decision below conflicts with the Commerce Clause of the Constitution and the Petitioner's Treaty, both granting exclusive jurisdiction over the Petitioner to the federal government. The Treaty of July 1, 1852, 10 Stat. 979 (App. 9), establishes the first organized control of the Petitioner by the federal government; it installs rules under which the Tribe will exist and establishes the initial trust relationship between the Tribe and the national government.

The United States has controlled Indian relations through the powers established in the Commerce Clause, U.S. Const. Art. I, Sec. 8, cl. 3, which provides that Congress shall regulate commerce with the In-

tribes. It is this regulatory power that was exercised for years to preempt state control of liquor sales to Indians, without restriction as to location. *United States v. Holliday*, 70 U.S. (3 Wall) 407, 417-418 (1866); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). Cohen, *Handbook of Federal Indian Law*, p. 91 states: "The power of Congress to regulate commerce with the Indian tribes has for its field of action the entire nation, not just the Indian country." This Commerce Clause power has been exercised down to the present date. *Warren Trading Post v. The Arizona Tax Commission*, 380 U.S. 685, 692 n. 18 (1965). Just as Congress previously extended federal control over liquor outside the boundaries of the reservation to protect its wards whenever the interest of trade and commerce required it, Congress has now extended its control to Indian economic activities outside the reservation to benefit its Indian wards.

Under the Commerce Clause and implementing statutes and regulations, the federal government has established a policy of economic development and protection of Indian tribes. The purpose of this policy is the establishment of an economic base for the Indians; such a base offers job opportunities, a better living standard and community stability. This allows preservation of Indian culture and tradition, while educating the Indians toward commercial maturity. An important characteristic of this policy is profitability of tribal developed enterprises, and the measure

Felix S. Cohen, *Handbook of Federal Indian Law*, University of New Mexico Press (1942); reprinted by the U.S. Department of the Interior, *Federal Indian Law* (1958). Hereinafter, *Handbook of Federal Indian Law* cited as *Cohen* and the revision as *Federal Indian Law*.

of success for this policy is the degree of economic betterment to the Indian. Under such a policy a state tax would directly interfere with the federal scheme.

Whether the enterprise is located on or off tribal land is not the criteria to determine if the state may tax the Tribe. The relevant factors are whether the enterprise is under federal control and regulation and is meeting the goals of federal Indian policy. The statutes and regulations indicated throughout this brief show that the conduct, the control and implementation of this enterprise is under the direction of the Department of the Interior. The purpose is economic development and cultural stability. The purpose and control place this enterprise under the guidance of the federal government, all to the exemption of the state. Such purpose in effect makes the location of the enterprise only incidental. See Cohen, p.262; *Federal Indian Law*, p. 864.

The policy of protecting the status of Indian tribes is being implemented on the leased property as it is on property physically located within the tribal boundaries. The use of this property for gainful purposes allows Indian competency and self-development to continue. *Squire v. Capoeman*, 351 U.S. 1 (1956). Even the actual use is consistent with federal Indian policies as it gives the tribe a source of revenue that benefits the members of the tribe and establishes a training ground in which tribal members can develop commercial skills (App. 3-4). The ski resort has become the tool used by the federal government to provide financial aid to the tribe.

Turning the issue around, it can readily be seen

that the existence of the ski resort, whether on federal land leased to the Indians or upon reservation lands, creates no added burdens for the State of New Mexico.

It should be noted that New Mexico is not a "Public Law 280" state. When Congress offered New Mexico the opportunity to take Indian tribes under state control, with incumbent duties and responsibilities, the state failed to step forward and assume dominion. See Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C. 1360. Instead, the duties and responsibilities for this enterprise have continued to rest on the shoulders of the federal government. It appears to be incongruous that the State of New Mexico would have taxing power over this ski enterprise, when it has had no responsibilities or duties relative to the building and operation of the ski resort.

Federal Indian policy is implemented by specific statutes and regulations relating to Indians. The Tribe acquired and operates the ski resort with funds secured under 25 U.S.C. 470 and regulated by 25 C.F.R. pt. 81. Such federal enactments place programs of Indian development in the realm of reality. The purpose of 25 U.S.C. 470, with an exemption from state taxes being provided by 25 U.S.C. 465, is to allow economic development for the benefit of Indian tribes. For that purpose, it is of no consequence whether the land in question was reservation land, or land committed by the government to tribal economic development.

The far-reaching effects of 25 U.S.C. 470 have recently been interpreted by the Ninth Circuit in

Stevens v. Commissioner of Internal Revenue, [illegible] (C.A. 9th, 1971). It should be noted that in the Stevens case the property from which the income was derived had been received by allotment, gift and purchase. These lands were deemed to be held in trust by the United States of America for the individual Indian and the derived income is exempt from federal income taxation. If federal income taxes do not apply to income created from lands secured under 25 U.S.C. 470, how can the State of New Mexico apply its taxes to the efforts of a whole tribe being utilized for the betterment of its members? Petitioner would suggest that the use of 470 funds in the present case creates even stronger exemptions from taxation because the economic development is for the whole tribe and creates job opportunities for many members of the tribe (App. 3-4).

Another case indicative the broad federal control of Indian held lands and the limitation on the states in exercising any type of control over such lands, *Carpenter v. United States*, 261 U.S. 219, 228 (1923), involves an individual Indian and a question of whether certain lands are reserved even though held outside a reservation. The Court declares that a state disclaims any land "... owned or *held* by *any Indian* or Indian Tribes." (Emphasis by the Court).

The leased land upon which this enterprise is located was acquired pursuant to Art. XI, Sec. 1 of the Pueblo's Constitution (App. 19-20). This leased land is performing a function of the trust interest since it was so approved by the Secretary of the Interior and is utilized for the economic well-being and

social and economic improvement of the tribe. The Petitioner suggests these leased lands have the same status as trust lands since utilized pursuant to the tribal Constitution and under economic development policies of the federal government. 25 U.S.C. 465 refers to this interest as one held in trust by the United States for the Indian tribe. This theory further implements federal Indian policy by securing economic growth and preserving Indian culture. Again, the basic purpose of any tax exemption is to enable the land preserved for the use of the tribe to serve as a tax-free base for economic growth. Its location should not affect its exempt status.

Congress has drawn no distinction between interests on the reservation and those off when implementing its policy of economic development. 25 U.S.C. 465 allows the Secretary of the Interior to secure any surface rights or interests, ". . .within or without existing reservations, . . .". The tax exemptions of 25 U.S.C. 465 apply whether the interest is on tribal lands or lands on which the tribe has an interest. In either instance, the lands are protected under federal Indian policies for economic development and economic self-sufficiency. See also, 25 U.S.C. 1322 (b) and 25 C.F.R. 11.4.

Federal Indian policy was specifically applied to New Mexico when New Mexico joined the Union. The Enabling Act for New Mexico, ch. 310, § 2, cl.2, 36 Stat. 557 (1910), provides that new lands may be acquired by Indians under ". . . any act of Congress, but such Congress shall provide that all such lands shall be exempt from taxation by said state so long and to such

sellent as Congress has prescribed or may hereafter prescribe." The New Mexico Enabling Act compliments 25 U.S.C. 465 and exempts tribally held lands from state taxation. *United States v. Rickert*, 188 U.S. 432 (1903), interpreted the South Dakota Enabling Act when the State of South Dakota attempted to tax personal property interests of Indians; that act is similar to the New Mexico Enabling Act. Petitioner suggests its situation is a present day counterpart to the old issues dealing with personal property taxation raised by *Rickert*. This Court said at 188 U.S. 432, 441 and 443:

"It is true that the statutes of South Dakota, for the purposes of taxation, classify 'all improvements made by persons upon lands held by them under the laws of the United States' as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States."

and

"The personal property in question was purchased with the money of the government, and was furnished to the Indians in order to maintain them on the land allotted during the period

of the trust estate and induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose."

The New Mexico Supreme Court in *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 330, 361 P.2d 950 (1961), not only acknowledges the tax exemption of the Enabling Act, but also states that the State of New Mexico has no jurisdiction over Indian held lands unless such jurisdiction is specifically granted by Congress. This Court in *United States v. Sandoval*, 231 U.S. 28 (1913) and *United States v. Candelaria*, 271 U.S. 432 (1926), interpreted the New Mexico Enabling Act. Those cases again declared that the New Mexico Enabling Act reiterates federal control over the Indian tribes and denies the State of New Mexico jurisdiction. The Enabling Act serves as a further limitation on the State of New Mexico and its relationship with sovereign Indian tribes, and complements other federal statutes which specifically exempt Indian held interests from state taxation.

Congress has taken very positive steps to assist the Indian tribes in achieving economic maturity and only the Congress can alter that federal Indian policy. *United States v. Daney*, 370 F.2d 791, 795 (C.A. 9th, 1966). Such a continued, close contact between the federal government and the Indian tribes, has specifically shown that the state has no authority to

tax the economic activities of the Mescalero Apache Tribe.

From the foregoing authorities, and as a result of legislation and federal policy, it can be seen that the federal government has preempted the field of economic control over Indian tribes. This is a fragile and important control, because one of the important aspects of this policy is that the tribe be able to establish independence and self-reliance by making a profit on this enterprise. To do this, Congress has taken very positive steps to remove any visages of state control over Indian economic efforts. In the present case, it is obvious from the statute creating the economic fund, through regulations implementing the use of these funds, and through controls as indicated in the Stipulation of Facts (App. 2-8), that the federal government is vitally interested in the economic well-being of the Tribe and intends to regulate and protect the Tribe's economic growth.

It has been the goal of various acts passed by Congress to aid the Indians in economic development; these have included the establishment of the Bureau of Indian Affairs, the establishment of reservations and the allotment system. In each case, the result has been federal preemption of the state. In the present case, Congress has changed the device to one of federal funding of economic projects, but has not changed the exempt status of the endeavor.

In *Warren Trading Post v. The Arizona Tax Comm.*, 380 U.S. 685 (1965), this Court precluded the state from taxing the business of an Indian trader licensed

by the federal government. The amount of legislation concerning regulation of Indian traders is an insignificant portion of the volume of federal legislation pertaining to Indians. A review of the Stipulation of Facts and the federal statutes and regulations presently involved, indicate far greater federal control here than that imposed on the Indian trader in *Warren Trading Post*. Where this much control exists for economic development, the state cannot interfere with that development and is therefore precluded from jeopardizing Indian progress through taxation. The proceeds derived from the tribal activity and the use of the tangible property on the ski area are beyond the taxing power of the State of New Mexico.

The State of New Mexico through its gross receipts tax and use tax is attempting to tax the privilege of engaging in this particular form of business. Such control cannot be present when federal statutes and federal Indian policy have preempted the field. Looking at the tax involved from another way, the State of New Mexico did not give the Tribe the privilege of engaging in this enterprise and cannot take it away. Based on this fact, the State of New Mexico cannot tax the enterprise. *Arenas v. United States*, 140 F. Supp. 606, 608 (1956).[2]

The State of New Mexico cannot grant or withhold from an Indian tribe the privilege of doing business, because the field of commerce with Indian tribes is completely removed from the sphere of state power by the Commerce Clause of the Constitution. The

[2] Affirmed Sub Nom. *Kirkwood v. Arenas*, 243 F. 2d 863 (C.A., 9th,

Commerce Clause gives the federal government exclusive power over commerce with the Indians no matter where the location of that commerce. The exclusive power of the federal government over commerce with Indians is not limited to Indian reservations, but extends to any transaction with Indians. A tax laid directly upon the conduct of business by an Indian tribe is contrary to federal authority, federal Indian policy and a direct impairment to commerce with Indian tribes. The Treaty and the Commerce Clause control the commercial intercourse of the tribes, with this directive implemented by federal legislation and regulations, all to the exclusion of the state.

II

THE STATE OF NEW MEXICO CANNOT TAX THE MESCALERO APACHE TRIBE BECAUSE SUCH A TAX WOULD INTERFERE WITH THE RIGHT TO SELF-GOVERNMENT.

The use tax and gross receipts tax levied by the State of New Mexico in this case are assessed directly against the Tribe. Both taxes represent a direct impairment of Petitioner's economic development by taxing the tribe's privilege of conducting business, thereby creating a direct impact on attempts at economic self-sufficiency by this Tribe. The most important impact of such a tax would be to allow the state to impose further taxes upon the Tribe and lead to the eventual destruction of the tribal entity. These direct impairments are contrary to the concept of tribal sovereignty established by the federal legis-

tion referred to in Point I and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). Federal Indian policy is to allow economic development of the tribe for the future well-being of the tribe. The taxes being imposed by the State of New Mexico are contrary to this federal policy and have the effect of restricting Indian tribal choices of business ventures, with a further limitation as to the location of these ventures. Such restrictions thwart self-government decisions by the Tribe and limit revenue raising projects by the Tribe, all to the detriment of tribal members. State law may not be applied where it interferes with the tribe's right to self-government, *Organized Village v. Egan*, 369 U.S. 60, 67-68 (1962), and tribal sovereignty compels the exemption from state taxation of all property used for tribal purposes.

25 U.S.C. 470 states that the funds granted thereunder are for the economic advancement of the tribe. 25 U.S.C. 465 indicates a tribe is not to be interfered with in taking these steps for economic advancement. This is because tribes must establish a vehicle for continuity and for meeting the obligations of a functioning sovereign. The Constitution, By-Laws and ordinances of the Petition all point to a viable government. One of the vehicles for this self-sustaining process is through economic development, such as the ski resort. Section 470 blends with Sections 465 and 476 to insure stability and continuity of the tribe.

The acknowledgment of tribal sovereignty becomes emphatic in light of the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1301 et seq., which clearly demonstrates Congressional intent to encourage tri-

bal activities, as in the present case, and thereby strengthen Indian self-government. 25 U.S.C. 132, under that Act, specifically states that a state cannot assume jurisdiction of an Indian tribe without the consent of that tribe. See *Kennerly v. District Court of Ninth Jud. Dist. of Montana*, 400 U.S. 423 (1971).

To circumvent the tribal sovereignty doctrine, the state must be able to point to specific Congressional approval of such action. Yet just the opposite is suggested by 25 U.S.C. 465 and 25 U.S.C. 470 which specifically indicate Congress has not given the state such permission in the present case.

The power to levy a privilege tax on the gross proceeds of sales and on the use of personal property would give the state the power to control prices and property use, which could eventually lead to other controls by the state. A state may not impose its laws upon an Indian tribe when those laws interfere with the tribe's right to self-government. *Williams v Lee*, 358 U.S. 217, 219 (1959). *Williams* not only holds that state law may not be applied when it interferes with the tribe's right to self-government, but also lays down a very narrow area in which tribal relationships were considered not to be jeopardized by state action. See 358 U. S. 217, 220-221. The present case does not fall within those narrow exceptions. In fact, no greater threat to self-government can be imagined than the allowance of one sovereign to tax another. The power to tax is the power to destroy rationale of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), has been applied to Indian tribes by *United States v. Rio-*

kert, 188 U.S. 432, 438 (1903). See *Cohen*, p. 122 and *Federal Indian Law*, p. 395.

The tribe is not striving for economic development so that it will have a proprietary gain, but is striving for economic maturity so that it can reach a level of employment, housing and prosperity for its people many Americans would consider marginal. The growth sought is not for the sake of monetary gain, but is to develop an acceptable standard of living for the Mescalero Apache people. Such is a function of the tribal government and that is the purpose of this economic endeavor. A taxing effort by the state threatens such a program, and is a direct impairment to tribal self-government.

III

THE MESCALERO APACHE TRIBE IS EXEMPT FROM NEW MEXICO TAXES BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

United States v. Rickert, supra., indicates that taxing of Indian held interests is a tax on an instrumentality employed by the federal government for the benefit and control of the Indian tribe. *Cohen*, p. 275 and *Federal Indian Law* pp. 472-473, state that an Indian tribe is an instrumentality and agency of the federal government. The holding in *Rickert* and the proposition of the treatises, gain importance in light of the language of 25 U.S.C. 470 ". . .for the purpose of promoting the economic development of the Indians . . ." Section 470 sets up a means, or agency, by which the government assists the Indian tribes in

economic growth. The states have been disallowed any tax perogative over such an instrumentality promoting this economic development; 25 U.S.C. 465 disallows the state any tax perogative over such an instrumentality promoting the economic progress of a tribe.

This relationship between Congress and the Indians for economic development goes back to the terms of the Treaty itself, which establishes responsibility on the part of the federal government to protect and promote the Tribe's development. In the present case the Tribe becomes the conduit, or instrumentality, in meeting this obligation of the federal government. The plan for Sierra Blanca and all details related to its development and continuity must be approved by the national government. Its control is under the Bureau of Indian Affairs, Department of the Interior, and repayment of the loan is made to the fund which in turn is to be used by other tribes - also under the control of federal government. This is part of a circle that the government has established to meet its duties to the Indians.

Under 25 U.S.C. 470 a revolving fund was established in which repayment was to the fund itself. If these funds are taxed, this creates a delay or perhaps even a reduction in repayment and therefore places a burden on the federal government and impedes the purposes of the fund. Such a direct cause and effect relationship due to state taxation of these funds further indicates that the Petitioner is a federal instrumentality, because a tax on the tribe will directly effect the efforts of the federal government.

This recurring tax will also decrease the amount of money which the Mescalero Apache Tribe will have available to apply towards advancing the social welfare and education of its members. Ironically, the gross receipts tax was initially a means of raising money for public school education; yet here the tax money would not be returned to the Tribe in the form of educational benefits as the federal government presently meets the bulk of the cost of educating the Indians[3].

The federal government uses various instrumentalities in dealing with all phases of its obligations to the American people, such as the V. A. and F.H.A. 25 U.S.C. 470 establishes the tribe as an instrument in fulfilling the national goal of economic betterment of Indian tribes. The Congress could have established this fund directly under the Department of the Interior, but to promote Indians toward economic self-reliance these funds were placed directly in the hands of the Indians, under the control of the Department of the Interior. Whether by Department control or Tribal control, the ski area is made possible by federal funds provided under 25 U.S.C. 470 which are being utilized by a federal instrumentality.

To tax this enterprise would be to tax an instrumentality employed by the United States for the benefit and control of a sovereign Indian tribe, contrary to established authorities and federal legislation.

[3] 25 U.S.C. 452-454 (The Johnson-O'Malley Act); 20 U.S.C. 239; 631-[illegible] (Impact Aid For Schools).

Conclusion

All of the facts of this case indicate a federal p
fostering economic development of the American
dian. This policy has developed out of a desire t
prove the way of life for these first Americans,
protecting their unique traditions and customs.
policy is also founded in concern for the econ
plight and struggle of these people, for while the
the first Americans, their economic standing is
from first. *Warren Trading Post v. The Arizona*
Comm., supra., recognized this need to bring the
dians up the economic ladder; the President of
United States, in his message to Congress on re
mendations for Indian policies on July 8, 1970,
Doc. No. 910303, 91st. Congress, Second Session (19
again voiced this concern.

The taxing efforts of the State of New Mexico c
pletely disregard this federal policy by attempting
remove the cloak of Indian sovereignty and circ
vent the Tribe's efforts for economic betterment.
trary to specific federal legislation and holdings
this Court.

For the reasons stated, it is respectfully submit
that the Judgment of the Court of Appeals of
State of New Mexico should be reversed.

Respectfully submitted,
F. Randolph Burroughs and
George E. Fettinger
Attorneys for Petitioner

June 6, 1972

Appendix A

25 U.S.C. Section 476: "Any Indian tribe, or ..., residing on the same reservation, shall have ... right to organize for its common welfare, and ... adopt an appropriate constitution and by-laws, ... shall become effective when ratified by a ma... vote of the adult members of the tribe, or of ... adult Indians residing on such reservation, as the ... may be, at a special election authorized and call... by the Secretary of the Interior under the rules ... regulations as he may prescribe. Such constitu... and by-laws, when ratified as aforesaid and ap... by the Secretary of the Interior, shall be re... by an election open to the same voters and ... ted in the same manner as hereinabove pro... Amendments to the constitution and by-laws ... be ratified and approved by the Secretary in the ... manner as the original constitution and by-

... addition to all powers vested in any Indian tribe ... council by existing law, the constitution ... by said tribe shall also vest in such tribe or ... council the following rights and powers: To ... legal counsel, the choice of counsel and fixing ... to be subject to the approval of the Secretary ... Interior; to prevent the sale, disposition, lease, ... encumbrance of tribal lands, interests in lands, or ... tribal assets without the consent of the tribe; ... negotiate with the Federal, State, and local ... ments. The Secretary of the Interior shall ad... tribe or its tribal council of all appropriation ... or Federal projects for the benefit of the

tribe prior to the submission of such estimates
Bureau of the Budget and the Congress.

2. Partial Table of Contents, 25 C.F.R. pt. 91:
regulation is too long to reproduce; for refere
particular sections, a portion of its Table of Co
follows:)

"Part 91 — General Credit to Indians.

Sec.

91. 1 Purpose.
91. 2 Eligible borrowers.
91. 3 Application.
91. 4 Purpose of loans.
91. 5 Approval of loans.
91. 6 Interest.
91. 7 Records and reports.
91. 8 Maturity.
91. 9 Security.
91.10 Penalties on default.
91.11 Assignment.
91.12 Tribal funds.
91.13 Relending by borrower.
91.14 Repayments.
91.15 Charters.
91.16 Educational loans.
91.17 Amendments to articles of association and
laws.
91.18 Loans to Navajo and Hopi Indians.
91.19 Loans to encourage industry.
91.21 Loans for expert assistance."